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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO HERNANDEZ
MARTINEZ,

Defendant and Appellant.

2d Crim. No. B206341
(Super. Ct. No. 2005022367)
(Ventura County)

Francisco Hernandez Martinez appeals the judgment following his conviction for first degree murder, together with a special circumstance finding that the murder was committed while lying in wait. (Pen. Code, §§ 189/187, 190.2, subd. (a)(15).)¹ The jury also found a true allegation that he used a deadly weapon in the commission of the crime. (§ 12022, subd. (b)(1).) Martinez was sentenced to one year, plus life without possibility of parole.

Martinez contends that use of CALCRIM No. 226 inadequately advised the jury of the dangers of testimony by an immunized accomplice, and that the trial court erroneously admitted hearsay statements by another accomplice into evidence. We will

¹ All statutory references are to the Penal Code unless otherwise stated.

order correction of the judgment to add a requirement of "DNA" testing and delete a parole revocation fine. Otherwise, we affirm.

FACTS

Martinez met Estela Magana in early 2005, and they had an affair. Magana was married to and living with the victim, 66-year-old Manuel Campos. Magana's 17-year-old daughter, Adelina Magana, lived with the couple.² Campos was in poor health, but was employed and provided for his family.

In the months before the July 2005 murder, the relationship between Magana and Campos had deteriorated and they frequently argued. Magana began talking to her daughter about killing or beating Campos. Magana told Adelina that she would "like to get him beat up," and that she wanted Campos to die and would have him killed by Martinez. Martinez also told Adelina that he would do anything for Magana, including killing someone. Martinez told Adelina that he would "take care of" Campos and "beat him up" and "kill him." Adelina did not take Martinez seriously, and thought he was drunk when he made those statements. Adelina advised her mother to divorce Campos, sell the house, and move away.

Magana told Adelina that July 4th would be a good day to kill someone because of the noise. While driving through the area where Campos was later murdered, Magana told Adelina that it looked like a good place to "beat up somebody or do something because it was lonely."

On July 4, 2005, Magana left the house to attend a barbeque with Martinez. The barbeque was given by Kathy Hubbard and Victor Barragan who were acquaintances of Martinez. Magana and Martinez arrived separately. Martinez asked Hubbard if she could get him a gun, as he had done several times before. Hubbard said no. Instead, Magana and Martinez bought a knife from Barragan. Magana paid the price and Martinez took the knife. Both Hubbard and Barragan identified the knife found at the scene of the crime as the knife Barragan sold to Martinez and Magana.

² We refer to Adelina Magana as "Adelina" to avoid confusion with Estela Magana.

Magana arrived home from the barbeque around 3:00 p.m., and told Adelina she had been at a barbeque with Martinez. At 6:00 p.m., Magana left the house, telling Adelina to stay home and call her if Campos left the house.

At 10:00 p.m., Magana telephoned home to tell Adelina that Magana's car had broken down at Olivas Park and Campos had to come and help her. Adelina heard Martinez's voice in the background saying such things as, "Tell that puto to come," "I'm going to handle him," and ". . . I'm going to kill his ass." Magana told Adelina to ignore Martinez's threats, to stay home, and not to tell Campos that someone was with her. Adelina told Campos that Magana needed his help because her van broke down. Campos went to assist Magana. When Campos arrived at the scene near Olivas Park, Martinez attacked him, and stabbed him to death.

At 11:00 p.m., a group of people drove past the murder scene and saw Martinez and Campos fighting on the street. Martinez was sitting on top of Campos stabbing him with a knife. One of the people, Elijah Williams, got out of the vehicle to intervene and assist Campos. Williams pulled Martinez off Campos and, along with the others, restrained him until the police arrived. Williams saw Magana speed away in her white minivan. Campos died before police arrived.

At the scene, police officers found jumper cables, a PVC pipe and metal rod, and the knife bought from Barragan. Campos had several stab wounds as well as bruises and abrasions indicating blunt force trauma. Martinez's hands were covered in blood. He smelled of alcohol but did not appear intoxicated.

Magana arrived home after 11:00 p.m., and told Adelina that "it's done." Magana stated that Martinez was hiding in a field when Campos arrived to attempt to start her van with jumper cables. She told Adelina that she told Campos to be careful when Martinez went to attack him. Magana told Adelina that Martinez pulled out a knife and went "crazy," and that she drove away when a car approached.

Magana and Adelina contacted hospitals and the police. They then drove past the crime scene and saw police officers and lights. They did not stop.

At approximately 5:00 a.m., police arrived at the house to inform Magana that Campos was dead. Magana's white minivan was in the driveway. When Magana came to the door, an officer noted that Magana did not react normally to news of her husband's death. Magana and Adelina had agreed to tell police that Campos had left the house in the morning and never returned. Martinez was arrested on July 5, 2005. Magana and Adelina were also arrested.³

DISCUSSION

No Instructional Error Regarding Credibility of Immunized Accomplice

Martinez contends that the trial court erred by failing to instruct the jury adequately on the "dangers" of testimony from an accomplice who has been given immunity. He acknowledges that the court instructed the jury with CALCRIM No. 226 which allows the jury to consider a grant of immunity in assessing witness credibility, and CALCRIM No. 335 which directs the jury to view accomplice testimony with "caution." He argues, however, that a special instruction should have been given that testimony by an immunized witness must be viewed with "distrust," and that CALCRIM No. 335 did not cure the deficiency because it used the less forceful word "caution." We disagree.

As Martinez acknowledges, our Supreme Court has declined to impose any sua sponte duty to give a special instruction regarding the credibility of a witness granted immunity. (*People v. Freeman* (1994) 8 Cal.4th 450, 508; *People v. Daniels* (1991) 52 Cal.3d 815, 867, fn. 20; *People v. Hunter* (1989) 49 Cal.3d 957, 977-978.) Therefore, Martinez has forfeited any claim that the instructions were inadequate because he did not request a clarifying or special instruction in the trial court. When the trial court proposes an otherwise correct instruction that the defendant believes is insufficient or incomplete, failure to request clarifying or amplifying language forfeits any claim of instructional

³ In a separate trial, Magana was convicted of first degree murder with lying in wait and financial gain special circumstances. (§ 190.2, subd. (a)(1)) 190.2 & (a)(15).) On August 12, 2008, we affirmed the conviction in an unpublished case. (*People v. Magana*, B201170.)

error in that regard. (*People v. Richardson* (2008) 43 Cal.4th 959, 1022-1023; *People v. Horning* (2004) 34 Cal.4th 871, 909.)

We address the merits of the contention because Martinez claims that he received ineffective assistance of counsel when counsel failed to request a separate instruction regarding the credibility of a witness granted immunity. We conclude that there was no ineffective assistance because no such instruction was required. Failure to make a meritless request cannot constitute ineffective assistance of counsel. (*People v. Frye* (1998) 18 Cal.4th 894, 985, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421.)

As stated above, the trial court instructed the jury with CALCRIM No. 226 which lists numerous factors the jury "may consider" in evaluating the credibility of a witness, including whether the witness was "promised immunity or leniency in exchange for his or her testimony." The instruction also provides that the jury may consider whether testimony was "influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided." In addition, the trial court instructed the jury with CALCRIM No. 335 which identified Adelina as an accomplice, prohibits the jury from convicting a defendant solely on the basis of accomplice testimony, and states that any "testimony of an accomplice that tends to incriminate the defendant should be viewed with caution." The instruction also states that the weight given to such evidence should be determined after "examining it with care and caution and in the light of all the other evidence."

CALCRIM Nos. 226 and 335 adequately instructed the jury regarding the credibility of testimony from an immunized witness who is also an accomplice. The instructions together state that immunity can be considered in assessing credibility, and that Adelina's testimony as an accomplice must be viewed with caution. Further, the jury was well aware that Adelina had been given immunity from prosecution for murder. Adelina testified that she had been in custody for a year, and had reached a plea agreement providing that the charges against her would be reduced to voluntary manslaughter if she was truthful and made herself available to the prosecution. In

addition, defense counsel presented a vigorous closing argument to the jury that Adelina had immunity and an interest in the outcome of this case and that her testimony was not believable because of her immunity and "because she wants to make sure that [Martinez] gets convicted so she doesn't have to do any more jail time." The jury instructions, combined with Adelina's testimony and trial counsel's argument, ensured that the jury would consider all relevant factors in determining Adelina's credibility. (See *People v. Garceau* (1993) 6 Cal.4th 140, 190-191, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118; *People v. Hampton* (1999) 73 Cal.App.4th 710, 721-724; *People v. Echevarria* (1992) 11 Cal.App.4th 444, 449-451.)

Moreover, Martinez's claim that the trial court should have instructed the jury to view accomplice testimony with "distrust," not merely "caution," has been rejected by our Supreme Court in *People v. Guiuan* (1998) 18 Cal.4th 558. The Court stated that the phrase "'care and caution'" better informs the jury about how to evaluate such evidence. (*Id.* at p. 569.) The Court then articulated the exact language now contained in CALCRIM No. 335 as the correct jury instruction. (*Ibid.*) The Court stated that the language of CALCRIM No. 335 sufficiently "casts doubt on the veracity of an accomplice who has an obvious motive to testify falsely." (*Ibid.*)

Martinez argues that the word "distrust" was warranted because Adelina's testimony was the only evidence that the crime was first degree murder. Not only is there no legal authority requiring such a distinction, but also the record does not support Martinez's factual assertion. There was substantial other evidence of first degree murder. Evidence that Martinez and Magana bought the murder weapon on the day of the crime supports the inference that Martinez and Magana planned the murder in advance. The location of the murder in a dark, deserted area to which Campos had been lured supports the same inference as well as the lying in wait special circumstance.

No Error in Admission of Hearsay Statements

Martinez contends that the trial court erred in admitting statements by Magana pursuant to Evidence Code section 1230 because the statements were not distinctly against her penal interest. Martinez does not challenge admission of statements

Magana made to Adelina *before* Magana drove to the area where Campos was killed, but claims error in the admission of a statement by Magana made *after* she returned home from the murder. After Magana returned home, she told Adelina that Martinez was waiting in the field and that, when Martinez "popped out," she told Campos to be careful. Martinez argues that this statement is inadmissible because it was an attempt to minimize Magana's involvement in the murder and not against her penal interest. We disagree.

Evidence Code section 1230 permits admission of hearsay statements when the declarant is unavailable, the statement was against the declarant's penal interest when made, and the statement is sufficiently reliable to warrant admission despite its hearsay character. (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611.)⁴ Any statement or portion of a statement not "specifically disserving" to the penal interests of the declarant is inadmissible. (*Id.* at p. 612.) And, a hearsay statement against the declarant's penal interest is admissible only if it has significant indicia of trustworthiness. (*Id.* at p. 614.)

To determine trustworthiness, the trial court should consider the totality of the circumstances, the possible motivation of the declarant, the relationship between declarant and defendant, and the ways human beings actually conduct themselves. (*People v. Duarte, supra*, 24 Cal.4th at p. 614.) The least trustworthy situation is when the declarant is attempting to deflect criminal responsibility onto others after having been arrested, while the most trustworthy situation is when "the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures. [Citations.]" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 335; see also *People v. Geier* (2007) 41 Cal.4th 555, 584.)

We review a decision to admit or exclude evidence under Evidence Code section 1230 for abuse of discretion, and will uphold the trial court's ruling unless it is

⁴ Evidence Code section 1230 provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

arbitrary, capricious, or patently absurd so as to result in a miscarriage of justice. (*People v. Geier, supra*, 41 Cal.4th at p. 585.) There was no abuse of discretion in this case.

The trial court reasonably found that the challenged statement was against Magana's penal interest and sufficiently trustworthy to warrant admission. Although she may have been attempting to deflect some criminal responsibility by claiming that she warned Campos, the statement is essentially inculpatory and "specifically disserving" to her penal interest. The statement admitted her presence at the scene of the murder, that she had been waiting with Martinez for Campos to arrive, and that she was a knowing participant in the execution of a plan to kill Campos. Any exculpatory inference from the statement was minor in comparison to its overall inculpatory effect. (See *People v. Cervantes* (2004) 118 Cal.App.4th 162, 175-176.)

Martinez also argues that the admission of Magana's hearsay statements violated his Sixth Amendment right of confrontation. We disagree. Under *Crawford v. Washington* (2004) 541 U.S. 36, 68-69, an out-of-court statement that is "testimonial" in nature violates the confrontation clause even if it falls within a firmly rooted hearsay exception. Testimonial statements include testimony at a preliminary hearing or grand jury, statements during police interrogations, and other statements which a reasonable person would believe could be used at a future trial. (*Id.* at p. 52.) To be testimonial, a statement must be made in purpose and form similar to testimony at trial, under circumstances with a degree of formality characteristic of testimony, and establish or prove some past fact for possible use in a criminal trial. (*People v. Cage* (2007) 40 Cal.4th 965, 984.) Magana's statements to Adelina--statements by a mother to a daughter in the home--were not testimonial under the *Crawford* standards.

Correction of Errors in Judgment

Respondent contends that the trial court erred by failing to order Martinez to submit to DNA testing. (§ 296, subd. (a)(1).) We agree, and Martinez does not contest the point. DNA testing is mandatory and is not forfeited by failure to request such an order in the trial court. (*Id.* at subds. (d)-(f); see *People v. Smith* (2001) 24 Cal.4th 849, 852.) Respondent also concedes that Martinez was erroneously ordered to pay a \$10,000

parole revocation fine. The fine was improperly imposed because Martinez was sentenced to life in prison without possibility of parole. (§ 1202.45; *People v. Oganessian* (1999) 70 Cal.App.4th 1178, 1185.)

We modify the judgment to add a requirement that Martinez submit to DNA testing (§ 296, subd. (a)(1)), and delete the imposition of a parole revocation fine (§ 1202.45). We direct the trial court to prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Edward F. Brodie, Judge
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